

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

<b>In re:</b>	)	<b>MPC 15-0203</b>	<b>MPC 110-0803</b>
	)	<b>MPC 208-1003</b>	<b>MPC 163-0803</b>
<b>David S. Chase,</b>	)	<b>MPC 148-0803</b>	<b>MPD 126-0803</b>
	)	<b>MPC 106-0803</b>	<b>MPC 209-1003</b>
<b>Respondent.</b>	)	<b>MPC 140-0803</b>	<b>MPC 89-0703</b>
	)	<b>MPC 122-0803</b>	<b>MPC 90-0703</b>
	)		<b>MPC 87-0703</b>

**MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES BASED ON  
THE STATE’S FAILURE TO DISCLOSE EXCULPATORY AND OTHER EVIDENCE**

Respondent, David S. Chase, M.D., through counsel, hereby moves the Medical Practice Board (the “Board”) to dismiss the Superceding Specification of Charges with prejudice. In support of his Motion, Respondent relies upon the following incorporated Memorandum of Law and the Exhibits attached hereto. Respondent requests an expedited hearing on this Motion.

**MEMORANDUM OF LAW**

**I. Introduction.**

As it has throughout these proceedings, the State has again taken improper actions that jeopardize Respondent’s right to a fair hearing in this matter. The recent depositions of the State’s own key witnesses have once more revealed that the State has repeatedly failed to disclose to Dr. Chase some of the most important exculpatory and other relevant evidence in its possession. The State failed to disclose key medical records in its possession which document that one of its central witnesses reported during her exam by Dr. Chase that she was experiencing the very cataract-related symptoms that she now denies. The State has also failed to disclose its own records of witness statements regarding the central issues in this matter. Each new phase of

pre-hearing discovery uncovers more evidence that the State is more interested in winning this case than it is in ensuring that justice is served. While the full extent of the State's failure to disclose has not yet been determined, the egregious violations uncovered to date demonstrate the State's complete disregard for Dr. Chase's due process rights and its total lack of commitment to conducting a fair and impartial investigation and hearing. Because the State has shown repeated contempt for the rules that govern this case, and has irreparably compromised the legitimacy of these proceedings, there is no remedy short of dismissal that will protect Dr. Chase's rights in this matter.

## **II. Factual Background.**

### **A. The State Has Repeatedly Represented To The Board And To The Respondent That It Has Produced All Of The Relevant Medical Records And Witness Statements In Its Possession.**

On July 18, 2003, the Medical Practice Board seized a number of patient medical records from Dr. Chase's office pursuant to a search warrant. Among the seized records was the patient file of Judith Salatino. Ms. Salatino was later named as one of the complaining witnesses in this action. She has also filed a separate class action lawsuit against Dr. Chase in Chittenden Superior Court.

In early August 2003, Dr. Chase's attorneys requested that the State provide them with copies of all of the medical records the Board seized from Dr. Chase's office pursuant to the July 18, 2003 search warrant. On August 14, 2003, the Board provided Dr. Chase with documents purporting to be complete and correct copies of the requested records. (See August 14, 2003 correspondence attached hereto as Ex. A.) The produced documents included Dr. Chase's medical file for Judith Salatino and a number of other patients who later became complaining witnesses. (See Medical File of Judith Salatino as produced by the Medical Practice Board on

August 14, 2003, attached hereto as Ex. B.) Dr. Chase has since relied upon those files for purposes of preparing his defense in this matter.

In the fall of 2003, the Board's investigator conducted interviews with a number of the complaining patient-witnesses, including Ms. Salatino and Susan Lang. Those interviews formed the basis for many of the charges asserted against Dr. Chase in the State's Superseding Specification of Charges. Unlike all of the other complaining patient-witnesses, Ms. Salatino did not file a written complaint with the Board. As a result, Ms. Salatino's interview with the Board's investigator formed the sole first-hand basis for the State's allegations regarding Dr. Chase's treatment of her.

Throughout the fall of 2003, Dr. Chase requested that the State turn over all of the relevant documents in its possession. The State repeatedly stated that it had made all of the relevant documents in its file available to Dr. Chase and his attorneys. Although the State did produce notes of a handful of witness interviews that its investigator had performed, it produced no notes or reports regarding the Board investigator's interviews of Ms. Salatino or Ms. Lang. As of this date, the State has not acknowledged the existence of or produced any such notes or reports.

**B. The Deposition Of Ms. Salatino Revealed That The State Failed To Produce Key Exculpatory Portions Of Ms. Salatino's Medical Records.**

Dr. Chase's attorneys deposed Ms. Salatino on June 22, 2004. In preparation for that deposition, Dr. Chase became concerned that certain portions of Ms. Salatino's medical file were missing from the copy the Board had provided. In order to determine whether or not the medical file produced by the Board was complete, Dr. Chase's counsel in this action obtained another copy of Ms. Salatino's medical records from the attorneys representing Dr. Chase in Ms.

Salatino's civil action. That copy of the medical file was produced by Ms. Salatino in the civil action as part of routine discovery. She, in turn, had previously obtained her copy of the file from the Medical Practice Board. (6/2/04 Deposition of Judith Salatino ("Salatino Dep."), excerpts of which are attached hereto as Ex. C, at 81.)

Comparison of the copy of the medical file provided by Ms. Salatino to that produced by the Board revealed that the Board had failed to produce copies of a number of key pages of the Salatino medical file. (See Withheld Portions of Judith Salatino's Medical File, attached hereto as Ex. D.) The missing pages contained the most highly relevant and highly exculpatory information in Ms. Salatino's medical file. Specifically, those missing pages document that during her 2000 and 2003 examinations by Dr. Chase and his staff, Ms. Salatino admitted to experiencing a multitude of cataract-related visual symptoms, including glare, floaters, and problems reading newspapers and price tags. (See Exhibit D, pages Bates numbered SAL 0023, 0025, and 0031.) At her 2003 exam she also admitted that she was bothered by poor night vision, seeing rings around lights, and seeing in poor or dim light, all of which are typical symptoms of cataract sufferers. (See *id.* at 0031.) It was precisely these cataract-caused symptoms that formed the main basis of Dr. Chase's proper decision to offer Ms. Salatino cataract surgery in 2003.

**C. Ms. Salatino And Ms. Lang's Depositions Confirmed That The State Failed To Produce Relevant Documents.**

When testifying under oath at her deposition, Ms. Salatino denied that she had experienced the very cataract related symptoms documented on the withheld portions of her medical records. (Salatino Dep. at 50-53.) She also testified that she reported no such symptoms to Dr. Alan Irwin, who has rendered an opinion that Ms. Salatino is not an appropriate candidate for cataract surgery. (*Id.* at 82-83.) In light of these sworn statements, the importance of the

information in the withheld documents cannot be overstated: The withheld documents contain the very evidence Dr. Chase requires to demonstrate that Ms. Salatino did, in fact, have the symptoms that she now denies; they also contain evidence that renders Dr. Irwin's opinion of virtually no probative value, because it was based on Ms. Salatino's report that she had no cataract-related symptoms—a report very different from the one she gave Dr. Chase and his staff.

At her deposition, Ms. Salatino also confirmed that all of the information that she provided to the Medical Practice Board regarding her interactions with Dr. Chase was communicated to the Board during her interview with the Board's investigator. (*Id.* at 100-02.) Similarly, at her deposition, Ms. Lang testified that she was interviewed by the Board's investigator and that he took notes during that interview.<sup>1</sup> At their depositions, both witnesses made numerous statements that were at odds with their allegations as set forth by the State in the Superceding Specification of Charges.

### **III. Discussion.**

The recent depositions of Ms. Salatino and Ms. Lang have revealed that the State has withheld highly relevant and exculpatory documents from its productions to Dr. Chase. At the very least, the State has withheld medical records containing key exculpatory information and records of interviews with key witnesses. Of course, neither Dr. Chase nor the Board has any way of determining the nature or extent of other non-disclosures that may have occurred. Nonetheless, in light of the prior actions of the State and the Board's investigator, there is now ample reason to conclude that there had been a pattern and practice of improper conduct designed to preclude Dr. Chase from receiving a fair hearing. The State has repeatedly acted in a manner

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<sup>1</sup> The transcript of Ms. Lang's deposition, which took place on July 6, 2004, is not yet available. Respondent will submit the relevant portions to the Board as soon as they are available.

consistent with its desire to win at any cost, and inconsistent with its obligation to see that justice is served. There is no excuse for the State's blatant disregard of its discovery and truth-seeking obligations. Nor is there any remedy short of dismissal that can cure the prejudice caused Dr. Chase and reassure Respondent and the public that this proceeding is being conducted in a fair and impartial manner.

**A. The State Has An Obligation To Turn Over Material And Exculpatory Evidence.**

Although it should go without saying, the State's conduct in this action makes it necessary to reiterate that the State has an obligation to produce to Dr. Chase all of the evidence in its possession bearing in the question of Dr. Chase's guilt or innocence of the State's charges. This obligation is embodied in Board Rule 19.1, which unequivocally states that the Respondent "is entitled to *any information* in the Board's possession, with the exception of investigatory files as to matters which have not resulted in charges of unprofessional conduct" and privileged material. Board Rule 19.1 (emphasis added). The State's disclosure obligations are also required by the Due Process Clause: "When the prosecution fails to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment, the prosecution violates the defendant's due process rights." State v. LeClaire, 819 A.2d 719, 723 (Vt. 2003) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963) ("the suppression by the prosecution of evidence favorable to the accused upon request violates due process"). The due process right to receive potentially exculpatory information in the State's possession extends to administrative, as well as criminal, proceedings. McCormick's Handbook of the Law of Evidence § 354 at 853 (Edward W. Cleary ed., 2d ed. 1972) ("exculpatory information in an agency's possession or file data which may aid respondent's preparation or presentation of his case must be disclosed by the agency"); see also Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) ("Presumably the

essentials of due process at the administrative level require similar [Brady] disclosures by the agency where consistent with the public interest.). “Anything less would violate the commands of procedural due process, which *every adjudication* must observe.” McCormick § 354 at 853 (emphasis added).

**B. The State Breached Its Obligations To Produce Relevant And Exculpatory Evidence.**

Here, the State’s own records and the sworn deposition testimony of its own witnesses leave no doubt that the State has flouted its discovery obligations under Rule 19.1 and blatantly violated Dr. Chase’s due process right to receive exculpatory evidence. First, the State simply did not produce to Dr. Chase the portion of Ms. Salatino’s medical file in which she admitted having the very symptoms that Dr. Chase relied upon in offering her cataract surgery. It was only as a fortuitous result of the fact that Ms. Salatino has sued Dr. Chase in a separate proceeding, and separately produced medical records in connection with that proceeding, that Dr. Chase’s Board counsel was able to discover the State’s failure to disclose. Because both Dr. Chase and Ms. Salatino received their copies of her medical records from the Board after those records were seized, the facts admit of only one possible conclusion: The State produced a full copy of Ms. Salatino’s medical records to Ms. Salatino herself, but provided Dr. Chase with a copy that omitted the important exculpatory information. Of course, neither Dr. Chase nor the Board have any way of knowing what other relevant medical records, exculpatory or otherwise, have been withheld by the State.

Second, the State has not produced important records of witness statements. Ms. Lang testified at deposition that she was interviewed at length by Board investigator Phil Ciotti. She further testified that Mr. Ciotti took notes during that interview. Nonetheless, the State has produced no notes or other records of Mr. Ciotti’s interview of Ms. Lang.

Similarly, the Superseding Specification of Charges relating to Ms. Salatino contains detailed allegations concerning Dr. Chase's treatment of her. Ms. Salatino testified at deposition that she did not provide the Board with a written complaint, but instead communicated the substance of her complaint orally to Mr. Ciotti in an interview. As a result, the State necessarily relied upon Ms. Salatino's oral statements as a basis for its Charges. Nonetheless, the Board has produced no notes or other records of Ms. Salatino's interview. It is implausible that there exists no record of such an important witness statement, and it would in fact be irresponsible for the State to base formal charges on the oral statement of such a witness without recording it in some way. The only rational conclusion that the Board can draw is that the State possesses but has failed to produce its records of Ms. Salatino's interview.

**C. Dismissal Is The Only Appropriate Remedy.**

The egregious and prejudicial nature of the State's repeated failures to disclose cannot be overstated. The crux of the State's allegations with regard to Ms. Salatino is that Dr. Chase's decision to offer Ms. Salatino cataract surgery was not medically justified. The question of whether or not cataract surgery is appropriate turns in large part upon whether a patient is experiencing visual symptoms related to his or her cataracts. Like many of the State's complaining witnesses, Ms. Salatino has now denied experiencing certain cataract-related visual symptoms prior to her surgery. (Salatino Dep at 50-53.) She also denied those symptoms to Dr. Irwin, who therefore unsurprisingly concluded that she did not need cataract surgery. (*Id.* at 82-83.) Yet, the records that the State withheld from Dr. Chase directly contradict Ms. Salatino's sworn assertions. They bolster Dr. Chase's consistent position that Ms. Salatino was a proper surgical candidate due to her self-reports of cataract-related symptoms. They also completely undermine the probative value of Dr. Irwin's opinion that she is not a proper surgical candidate



because that opinion was based on information entirely at odds with what Ms. Salatino told Dr. Chase and his staff. It was through fortuity alone that Dr. Chase was able to discover the existence of the withheld documents. This Board cannot rely on similar luck in guaranteeing Dr. Chase's due process rights with respect to the charges of other complaining witnesses.

Similarly, like all of the State's complaining witnesses to date, Ms. Salatino and Ms. Lang have given deposition testimony that is at odds with key allegations attributed to them in the Superseding Specification of Charges. It is now known that the Board's investigator made records of prior interviews of both of these witnesses. Dr. Chase must be allowed to review those records in order to explore those inconsistencies, effectively examine the State's witnesses and, best present his defense in this matter. Similarly, the Board must have access to those interview records in order to exercise its primary function in this matter: determining the truth. Board Rule 19.1 demands nothing less.

In light of the State's repeated and prejudicial failures to disclose relevant and exculpatory information to Dr. Chase as required by Board Rules and the Constitution, the Board must dismiss the Superseding Specification of Charges. As one commentator succinctly put it, if the prosecuting agency does not disclose relevant and exculpatory information, "[t]he alternative is to drop the prosecution against the respondent." McCormick § 355 at 853. Courts, too, have often recognized that dismissal is appropriate "where the government engaged in serious misconduct and such misconduct prejudiced the defendant[]." United States v. McLaughlin, 910 F. Supp. 1054, 1057 (E.D. Pa. 1995); see also United States v. Samango, 607 F.2d 877 (9<sup>th</sup> Cir. 1979) (dismissing indictment due to government's intentional suppression of favorable testimony); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (dismissing due to failure to divulge

exculpatory evidence and other misconduct); United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla.1977) (dismissing due to withholding of exculpatory testimony).

Dismissal is all the more appropriate where, as here, the State's failure to disclose has been part of a more comprehensive effort to keep Dr. Chase from discovering the information relevant to his defense. As detailed in prior motions and addressed by prior Board Orders, the Board's investigator has purposefully falsified the key witness statement in this matter, necessitating the reinstatement of Dr. Chase's medical license. The State, in turn, has improperly impeded Dr. Chase's access to its witnesses by recommending that they not speak informally with Dr. Chase's lawyers, requiring a curative Order by the Board. At every turn, the Board's investigator and the State have blocked Dr. Chase's access to evidence, as well as the Board's access to the truth. In light of these improprieties, Dr. Chase does not and should not have confidence that the State's witnesses actually made many of the allegations purportedly underlying the Specification of Charges or that the State has accurately conveyed those allegations in its charging document. These facts make it doubly important that Dr. Chase have access to all of the relevant documentary information to which he is entitled and that the State disclose all such evidence in its possession. Sadly, the record now unequivocally demonstrates that the State has failed to live up to even this most basic obligation.

Finally, dismissal is necessary in order to protect the integrity of the State's regulatory power and the legitimacy of the Board's proceedings, in both this and future cases. In administrative actions, like criminal actions, "the ultimate objective is not that the Government 'shall win a case, but that justice shall be done.'" Sperry & Hutchinson, 256 F. Supp. at 142 (internal quotations omitted). If the charges against Dr. Chase are allowed to stand and the State is allowed to repeatedly violate Rule 19.1 and the Due Process Clause, neither Dr. Chase nor the

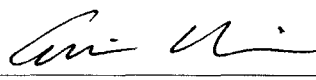
public can have confidence that this or future Board proceedings will be a fair and just adjudication based on fact and law, rather than an effort by the State to revoke Dr. Chase's license at any cost. Simply put, the State has ignored its statutory and constitutional obligations too many times, with too great a prejudicial effect to Dr Chase, and with enormous damage to the Board's regulatory authority. The Board must put an end to the State's blatant disregard for the rules of the game and must dismiss this matter before yet more damage is inflicted on Dr. Chase and on the legitimacy of the disciplinary process.

#### **IV. Conclusion.**

Each new phase of pre-hearing discovery in this matter uncovers new and irrefutable evidence that the State is improperly blocking Dr. Chase's access to evidence and impeding the Board's ability to learn the truth. The Board should not allow this case to proceed to hearing under these irretrievably unconstitutional conditions. As a result, Dr. Chase respectfully requests that the Board dismiss the Superseding Specification of Charges.

Dated at Burlington, Vermont, this 8<sup>th</sup> day of July, 2004.

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